United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

No. 77-4157

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioner*,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Respondents*,

POWER AUTHORITY OF THE STATE OF NEW YORK, *et al.*,
AMERICAN ELECTRIC POWER COMPANY, *et al.*,
BOSTON EDISON COMPANY, *et al.*, and
PENNSYLVANIA POWER & LIGHT COMPANY, *Intervenors*.

On Petition for Review of an Order of the Nuclear Regulatory Commission

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BRIEF FOR INTERVENORS POWER AUTHORITY OF THE STATE OF NEW YORK, ROCHESTER GAS AND ELECTRIC CORPORATION, NIAGARA MOHAWK POWER CORPORATION, PUBLIC SERVICE COMPANY OF INDIANA, INC., COMMONWEALTH EDISON COMPANY, AND EXXON NUCLEAR COMPANY, INC.

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On Petition for Review of an Order of the Nuclear Regulatory Commission

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BRIEF FOR INTERVENORS POWER AUTHORITY OF THE STATE OF NEW YORK, *ET AL.*

PRELIMINARY STATEMENT

This brief is submitted on behalf of Power Authority of the State of New York, Rochester Gas and Electric Corporation, Niagara Mohawk Power Corporation, Public Service Company of Indiana, Inc., Commonwealth Edison Company, and Exxon Nuclear Company, Inc. ("Inter-

venors''). Intervenors subscribe to the argument advanced by American Electric Power Company, *et al.*, Boston Edison Company, *et al.*, and Pennsylvania Power & Light Company in their brief of January 13, 1978 that the Atomic Energy Act does not require the Nuclear Regulatory Commission to make any findings concerning the safety of future nuclear waste management prior to licensing an individual nuclear power reactor. However, we wish to bring to the Court's attention two additional points. First, Congress in 1974 and again in 1977 specifically rejected the relief requested by Petitioner. Second, Petitioner is barred procedurally, and in any event gains nothing substantively, from its attempted reliance here (but not below) on the National Environmental Policy Act of 1969.

COUNTERSTATEMENT OF THE ISSUE

Whether the Nuclear Regulatory Commission is required by the Atomic Energy Act to make a definitive finding concerning the safety aspects of radioactive waste management as a prerequisite to the continued licensing of nuclear power reactors.

COUNTERSTATEMENT OF THE CASE

Introduction

This case involves a review by this Court of the denial by the Nuclear Regulatory Commission[1] (''NRC'' or ''Commission'') of a Petition for Rulemaking[2] filed by Natural Resources Defense Council, Inc. (''NRDC'') on November 8, 1976. That petition sought to compel the

[1] The Nuclear Regulatory Commission was created pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.* (Supp. V 1975), and entrusted with the ''licensing and related regulatory functions of the Atomic Energy Commission.'' 42 U.S.C. § 5841(f).

[2] Petition of the Natural Resources Defense Council for a Determination, Prior to Issuance of Reactor Operating Licenses, Whether Radioactive Wastes Can Be Disposed of Safely (''Petition for Rulemaking'').

Commission to institute a rulemaking proceeding, not for the purpose of adopting or amending any specific regulation, but rather to undertake a generic inquiry into the question "whether radioactive wastes can be generated in nuclear power reactors and subsequently disposed of without undue risk to the public health and safety." Petition for Rulemaking at 15. NRDC further asserted that the Commission could not lawfully issue any additional operating licenses for nuclear power reactors until the requested generic inquiry was completed and a positive finding made.

On June 27, 1977, the Commission denied NRDC's Petition for Rulemaking on the grounds that the Atomic Energy Act, the Commission's regulations, and the Energy Reorganization Act do not require the specific findings demanded by NRDC as a condition precedent to the licensing of individual nuclear power reactors. Notice of Denial of Petition for Rulemaking ("Notice of Denial"). NRDC's Petition for Review of that denial followed.

Commission Reactor Licensing Responsibilities

This case turns on the scope of the statutory findings that must be made by the Commission prior to the issuance of an operating license for a nuclear power reactor. Those findings are required by §§ 182a. & 103d. of the Atomic Energy Act, 42 U.S.C. §§ 2232(a), 2133(d) (1970). Section 182a. requires that the Commission be furnished sufficient information "to enable it to find that the utilization . . . of special nuclear material [in the reactor] . . . will provide adequate protection to the health and safety of the public." Section 103d. precludes the Commission from issuing an operating license should it find that "issuance of a license . . . would be inimical to the . . . health and safety of the public."

Both sections have been implemented by the Commission in 10 C.F.R. § 50.57 (1977). That regulation requires as a precondition to the issuance of an operating license that

the Commission find, *inter alia,* that there is "reasonable assurance that the activities authorized by the operating license [3] can be conducted without endangering the health and safety of the public . . . [and that] issuance of the license will not be inimical . . . to the health and safety of the public." (Footnote added.)

Prior to licensing a nuclear power reactor, the Commission does review the safety of a license applicant's plans and facilities for the interim storage of spent reactor fuel at the reactor site. Notice of Denial at 4. To Intervenors' knowledge, however, in licensing the 67 reactors now authorized to operate, the Commission has never considered it necessary to make the safety finding demanded by NRDC concerning the permanent disposal of high-level radioactive waste. The propriety of this lengthy course of action is now before this Court for review.

High-Level Radioactve Wastes

NRDC's Petition for Rulemaking was concerned with particular types of nuclear wastes, labeled in the petition as "high-level radioactive wastes." Petition for Rulemaking at 1-2. NRDC defined this category to include 1) high-level wastes as defined in 10 C.F.R. Part 50, Appendix F; 2) transuranic-contaminated wastes, *id.* at 2, n.1; and 3) reactor spent fuel, not previously considered by the Commission as "waste".

Reactor fuel undergoes fission within the reactor to produce heat that is eventually transformed into steam used to power turbines. Following the optimum conversion of energy from the fuel, the fission process is terminated, but significant quantities of uranium and plutonium (the latter produced during the fission process) remain in the fuel.

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[3] As will become clear from the subsequent discussion concerning the types of high-level radioactive wastes at issue in this litigation and the division of agency responsibilities for long-term waste management, the "activities" authorized by the license do not include the long-term storage or disposal of high-level radioactive waste. *See also,* Notice of Denial at 6.

This "spent fuel" is then removed from the reactor. Because of the potentially useable uranium and plutonium remaining in the fuel elements, spent fuel has not traditionally been viewed as "waste". Currently, spent fuel is stored in most instances on an interim basis at the reactor site in the spent fuel storage pool.

High-level radioactive wastes as defined in 10 C.F.R. Part 50, Appendix F (1977) include "aqueous wastes resulting from the operation of the first cycle solvent extraction system . . . and the concentrated wastes from subsequent extraction cycles . . . in a facility for reprocessing irradiated reactor fuels." Thus, if reprocessing, *i.e.*, the process by which the still fissionable uranium and plutonium are removed from spent reactor fuel, were undertaken, the residues would be considered as high-level radioactive wastes.

By definition, high-level wastes resulting from reprocessing are not produced by the reactor, at the reactor site, or by the reactor operator. Reprocessing requires a separate Commission license. 10 C.F.R. §§ 50.10(a), 50.2(a) (1977). Furthermore, given the deferral of reprocessing in this country,[4] it is problematical how much of this variety of waste will be produced in the future.

Transuranic-contaminated wastes have been broadly considered by the Commission as "[w]aste material containing or contaminated with transuranium elements (atomic number greater than 92)." 10 C.F.R. § 20.306 (proposed), 39 Fed. Reg. 32,921 (1974), *reprinted in* 1 NUC. REG. REP. (CCH) § 6329. The Commission has recognized, however, that transuranic-contaminated wastes "are de-

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[4] This policy was first announced by President Carter in April, 1977 and reiterated in October, 1977. *See* letter from Presidential Advisor Stuart Eizenstat to Dr. Joseph Hendrie, Chairman of the Commission (Oct. 4, 1977), *reprinted in* 42 Fed. Reg. 57,186 (1977). The Commission recently decided to defer, during current alternative fuel cycle studies, ongoing proceedings to license commercial-scale plutonium recycle facilities. 42 Fed. Reg. 65,334 (1977).

d primarily from the operation of fuel reprocessing ants. They consist of solidified liquids, [air] filters, cladding hulls, and general trash." OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS, U.S. NUCLEAR REGULATORY COMMISSION, NUREG-0116, ENVIRONMENTAL SURVEY OF THE REPROCESSING AND WASTE MANAGEMENT PORTIONS OF THE LWR FUEL CYCLE at 4-39 (Oct. 1976) ("NUREG-0116").[5]

Long-lived, high-level radioactive wastes are not a new or unique product of commercial power reactor operation. The need to manage and dispose of such wastes has been present since the weapons programs of the 1940's. In fact, although it is less radioactive, the total military high-level radioactive waste generated since that time is estimated to amount to some 215 million gallons. *Department of Energy Organization Act: Hearings Before the Comm. on Governmental Affairs United States Senate*, 95th Cong., 1st Sess. 829, 911-12. (1977) (*"DOE Hearings"*).[6] This volume, through a process of solidification, has since been reduced to about 74 million gallons. *Id.* at 846, 912. In any event, this volume is orders of magnitude greater than the approximately 600,000 gallons of high-level waste attributable to the commercial nuclear power industry. *Id.* at 905, n. 9.

Past and Present Waste Management Responsibilities

High-level radioactive wastes of the type previously discussed are extremely toxic and require isolation from the environment for considerable periods of time. Precisely because of this, the Federal Government—commencing with

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[5] *See also, id.* at 2-6. The General Accounting Office uses a similar definition: Transuranic-contaminated waste is "generated by plutonium fuel fabrication and fuel reprocessing facilities and laboratories using transuranium elements [and] . . . consists of expendable items, such as absorbent tissues, clothing, gloves, plastic bags, and equipment . . . ." COMPTROLLER GENERAL OF THE UNITED STATES, EMD-77-41, NUCLEAR ENERGY'S DILEMMA: DISPOSING OF RADIOACTIVE WASTE SAFELY 3 (Sept. 9, 1977) ("1977 GAO REPORT").

[6] Another estimate considers this volume to be as high as 230 million gallons. 1977 GAO REPORT at 4.

the Atomic Energy Commission ("AEC")—has assumed responsibility for the long-term storage and permanent disposal of these wastes. With the passage of the Energy Reorganization Act, primary responsibility for waste disposal shifted to the Energy Research and Development Administration ("ERDA"). Notice of Denial at 6; *see also,* H.R. REP. No. 93-707, 93d Cong., 1st Sess. 15 (1973). With respect to commercial (as opposed to military) waste, ERDA's efforts were directed towards the management and long-term storage of high-level waste. *DOE Hearings* at 822-23. The Commission's long-term[7] high-level waste management responsibilities in this area—unlike those of its predecessor agency—presently extend only to the licensing of ERDA (now the Department of Energy ("DOE")) "[f]acilities used primarily for the receipt and storage of high-level radioactive wastes resulting from activities licensed under [the Atomic Energy] Act." Energy Reorganization Act of 1974, § 202(3), 42 U.S.C. § 5842(3); *see also, DOE Hearings* at 823, 866.[8]

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[7] With respect to *short-term* high-level waste management, as noted above, the Commission regulates interim spent fuel storage at the reactor site. The Commission's regulations would also regulate the short-term storage of high-level waste at a reprocessing facility—assuming it were licensed by the Commission for operation—and require that such wastes be solidified and shipped to a federal repository within 10 years. 10 C.F.R. Part 50, App. F (1977). Away from reactor spent fuel storage facilities are also licensed by the Commission, although in proceedings separate from reactor licensing proceedings. *See generally, DOE Hearings* at 870; 10 C.F.R. §§ 70.3, 70.4(m), 30.3, 30.4(d) (1977).

[8] It has been suggested that there may be a gap in the Commission's licensing authority over certain ERDA (DOE) facilities. Because § 202 refers to "[f]acilities used primarily for the receipt and storage of high-level radioactive wastes", and since "high-level" wastes are specifically defined in the Commission's regulations (10 C.F.R. Part 50, App. F)—although not in the statute—to include certain byproducts of reprocessing, the Commission may lack authority to license facilities designed primarily for long-term storage of spent fuel or transuranic wastes. *See generally, DOE Hearings* at 868-70. Regardless of whether these gaps exist, and regardless of whether they may be cured simply by amendments to the Commission's regulations or may require an amendment to the Energy Reorganization Act, Congress was clearly

While it has long accepted the responsibility, the Federal Government has not yet constructed a permanent high-level waste disposal facility. This has not been due, as NRDC suggests (Brief at 10), to any failure to link reactor licensing and waste management. Rather, as most experts recognize, long-term waste management is technically feasible (*DOE Hearings* at 851, 879, 903), and the lack of a facility at the present time is in large part a result of differing views on the type of facility preferred. *Id.* at 883, 899. Precisely because of this impasse, Congress specifically charged DOE with centralized nuclear waste management responsibilities of an increased priority. Section 203(a)(8) of the Department of Energy Organization Act, 42 U.S.C.A. § 7133(a)(8) (Supp. 3, Nov. 1977) provides that the Department of Energy shall undertake:

> [n]uclear waste responsibilities, including—
>
> ....
>
> (B) the establishment of control over all existing nuclear waste in the possession or control of the Government and all commercial nuclear waste presently stored on other than the site of a licensed nuclear power electric generating facility. . .;
>
> (C) the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes;
>
> ....

Senator Mathias, the author of this provision, explained that:

> This portion of this bill fixes responsibility where it ought to be so that Congress, in its oversight function, can direct that the problem of dealing with nuclear waste is efficiently and effectively and promptly handled.

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aware of the problem. The responsibility for *storage* of all of these materials is now placed squarely on DOE. Department of Energy Organization Act, § 203(a)(8), 42 U.S.C.A. § 7133(a)(8) (Supp. 3, Nov. 1977).

> . . . [W]hat we are trying to do is assemble in one place—codify, as it were—the existing law, and to fix the responsibility so clearly that it cannot be evaded.

123 CONG. REC. S7948 (daily ed. May 18, 1977).

In carrying out this responsibility, DOE has announced that it plans to have a geologic repository for high-level wastes operational by 1985. To this end, DOE plans to identify two specific geologic sites—most probably salt beds—by the end of fiscal year 1979. Address by Dennis R. Spurgeon, Department of Energy, before the Atomic Industrial Forum, San Francisco, California (Nov. 30, 1977).

On October 18, 1977, DOE also announced a comprehensive spent fuel policy prompted in major part by the Administration's desire to defer reprocessing. *See generally*, OFFICE OF PUBLIC AFFAIRS, DEPARTMENT OF ENERGY, DOE ANNOUNCES NEW SPENT NUCLEAR FUEL POLICY, PRESS RELEASE R-77-017 (Oct. 18, 1977).[9] In essence, this policy announced that "the Federal Government is preparing to accept and take title to used, or spent, nuclear reactor fuel from utilities on payment of a one-time storage fee." *Id.* at 1. The policy contemplates both "interim and permanent spent fuel storage capability." *Id.* at 2. Subsequent public briefings by DOE have indicated that initially private industry, on a contract basis, would supply the necessary away-from-reactor interim storage. If private industry cannot supply such facilities, then DOE will do so. Permanent storage is planned for a geologic repository scheduled for operation by 1985.

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[9] NRDC, which objects in this Court to the Government's "delays, missteps and changes in direction" in its waste management efforts (Brief at 10; *see also, id.* at 14), greeted DOE's announcement of this policy with a warning that DOE should now proceed with deliberation. NRDC asked that DOE, prior to implementing the policy, conduct adjudicatory hearings on the issue and prepare a generic environmental impact statement to explore alternatives to that policy. *See* letter from Anthony Z. Roisman to Hon. James R. Schlesinger (Nov. 4, 1977).

Consideration of Environmental Effects of High-Level Waste Management in Reactor Licensing Decisions

This Court should not lose sight of the fact that the Commission presently considers the environmental effects of long-term, high-level waste management in individual reactor licensing decisions—despite suggestions to the contrary by NRDC (Brief at 43) and the California Energy Resources Conservation and Development Commission ("California") (Brief at 21).

Prior to the court's decision in *Natural Resources Defense Council, Inc.* v. *NRC,* 547 F.2d 633 (D.C. Cir. 1976), *cert. granted sub nom. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 429 U.S. 1090 (1977) ("*Vermont Yankee*"), the Commission considered the environmental effects of the nuclear fuel cycle —including specifically high-level waste management—in reactor licensing decisions by the use of a table (Table S-3) that quantified the contribution to such environmental effects from each individual reactor. 39 Fed. Reg. 14,188 (1974), codified in 10 C.F.R. § 51.20(e) (1975). The values in Table S-3 were derived primarily from a comprehensive Staff analysis,[10] supplemented by oral and written presentations from the public, and were to be factored into the individual environmental impact statement prepared by the Commission as a prerequisite to individual reactor licensing. 39 Fed. Reg. 14,188-91 (1974); *see generally,* 42 Fed. Reg. 13,803 (1977). The court's opinion in *Vermont Yankee* did not disagree with the values presented in Table S-3 (547 F.2d at 651), but rather with certain portions of the table's procedural underpinnings.

In the wake of that decision, the Commission issued a General Statement of Policy, 41 Fed. Reg. 34,707 (1976), which, *inter alia,* directed the Commission's Staff again to review the environmental effects of waste management

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[10] U.S. ATOMIC ENERGY COMMISSION, ENVIRONMENTAL SURVEY OF THE NUCLEAR FUEL CYCLE (Nov. 1972).

attributable to the licensing of a reactor with a view to refining Table S-3. The Staff's review, NUREG-0116, was completed in October, 1977, and is a comprehensive, detailed, and lengthy analysis that identifies the environmental effects of the fuel reprocessing and waste management activities associated with an individual reactor. This document served as the basis for a proposed, interim replacement table published for comment. 41 Fed. Reg. 45,849 (1976). Numerous comments were received on this proposed table. Both the comments, and the Commission's responses to those comments, were published. OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS, U.S. NUCLEAR REGULATORY COMMISSION, NUREG-0216, PUBLIC COMMENTS AND TASK FORCE RESPONSES REGARDING THE ENVIRONMENTAL SURVEY OF THE REPROCESSING AND WASTE MANAGEMENT PORTIONS OF THE LWR FUEL CYCLE (Mar. 1977). Based on those efforts, the interim table was made effective. 42 Fed. Reg. 13,803 (1977). This interim replacement table "quantif[ies] environmental impacts attributable to the . . . waste management portions of the LWR fuel cycle", *id.* at 13,804, and, like its predecessor, presents values to be factored into individual environmental impact statements prepared in connection with each reactor licensing proceeding. *Id.* A comprehensive proceeding to develop a permanent revised table, which likewise will quantify the environmental effects of the waste management portions of the nuclear fuel cycle, is now ongoing. 42 Fed. Reg. 26,987 (1977). Both NRDC and California are parties to that proceeding.

Thus, as a result of these analyses, the environmental effects of waste management are being and will be considered in reactor licensing decisions. The Commission's refusal to expand the scope of the safety findings required prior to licensing should in no way suggest that the issue of waste management is being ignored.

SUMMARY OF ARGUMENT

The Nuclear Regulatory Commission correctly refused to initiate the generic inquiry into the safety of long-term, high-level waste management demanded by NRDC. In enacting the Energy Reorganization Act of 1974, Congress specifically charged ERDA with paramount high-level waste management responsibilities. By contrast, the Commission's responsibilities in this area were limited to the licensing of ERDA waste storage facilities to be constructed in the future. Congress developed this dual agency approach—which continued to separate reactor licensing decisions from long-term waste management storage responsibilities—despite requests for a moratorium on reactor licensing and with full recognition that a permanent waste management facility had not yet been developed.

Again, in adopting the Department of Energy Organization Act in 1977, Congress was specifically aware that the continued licensing of nuclear power reactors was adding to the inventory of nuclear waste. Despite that knowledge, Congress imposed no moratorium on licensing, but rather, charged DOE with comprehensive responsibilities for nuclear waste management. This Court should not consider halting the licensing of nuclear reactors on a ground that Congress has so clearly, and recently, rejected.

Because both NRDC and California failed to present the argument to the Commission, they are now precluded from asserting that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970 & Supp. V 1975) ("NEPA"), requires the safety inquiry demanded by NRDC. Alternatively, this Court should reject that argument on the merits. The Commission's duty to consider environmental factors pursuant to NEPA is far different from its duty to make definitive safety findings under the Atomic Energy Act. Moreover, NEPA does not expand the Commission's safety responsibilities under the Atomic Energy Act. The Commission is discharging its NEPA

responsibilities by its existing requirements for consideration of the environmental effects of waste management in the licensing of individual reactors. 42 Fed. Reg. 13,803 (1977).

ARGUMENT

I.

IN ENACTING THE ENERGY REORGANIZATION AND DEPARTMENT OF ENERGY ORGANIZATION ACTS, CONGRESS HAS TWICE REJECTED BOTH THE REGULATORY APPROACH AND THE MORATORIUM NOW URGED BY NRDC.

The assignment of responsibility under the Atomic Energy Act for the licensing of individual nuclear power reactors and the separation by Congress of that function from the development of plans and facilities for the management of wastes generated by such reactors has been detailed in other briefs. We shall not attempt to restate that legislative background in this brief. Rather, we desire to focus the Court's attention on more recent, and explicit, Congressional consideration of the precise issue raised by NRDC's Petition for Review.

A. The Energy Reorganization Act Contradicts the Regulatory Approach Urged by NRDC.

In enacting the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.* (Supp. V 1975), Congress created a new agency, the Energy Research and Development Administration, and charged it with planning, research, and development responsibilities for all forms of energy. 42 U.S.C. § 5813. More significantly for this case, Congress transferred to ERDA the then-existing responsibilities of the Atomic Energy Commission for waste management. 42 U.S.C. § 5814(b) & (c); H.R. Rep. No. 93-707, 93d Cong., 1st Sess. 15 (1973). The responsibilities assumed by ERDA included the long-term management of high-level waste,

the object of NRDC's concern recited in the Petition for Rulemaking denied by the NRC and here under review. *DOE Hearings* at 822-23. Section 202(3) of the Energy Reorganization Act, 42 U.S.C. § 5842(3), gave to the newly-created Nuclear Regulatory Commission licensing authority over ERDA's "[f]acilities used primarily for the receipt and storage of high-level radioactive wastes resulting from activities licensed under [the Atomic Energy] Act."

NRDC refuses to acknowledge ERDA's paramount waste management responsibilities and simplistically contends that "the responsibility for ensuring that the public health and safety is not imperiled by the generation of [nuclear] wastes must reside with the agency which licenses the power reactors producing these wastes in the first place." NRDC Brief at 20. That argument ignores the dual agency approach to long-term waste management mandated by Congress as well as the explicit statutory limitation of the Commission's authority over the permanent disposal of high-level wastes to the licensing of ERDA (now DOE) facilities.

NRDC argues further (Brief at 35-36) that the Energy Reorganization Act supports its argument that a "definitive" finding of the safety of future waste management must be made prior to the issuance of a reactor operating license. The sections of that statute and the portions of its legislative history relied on by NRDC do not, as a brief analysis will show, support its argument.

NRDC first points to designated portions (pp. 23 & 56) of the Senate Report [11] on S. 2744 (eventually enacted as the Energy Reorganization Act). NRDC Brief at 35-36. Page 23 of that Report has nothing to do with the off-site storage of nuclear wastes; its concern is with safeguards provisions to protect against "sabotage and theft" of "potentially explosive nuclear materials"—primarily pluto-

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[11] S. REP. No. 93-980, 93d Cong., 2d Sess. (1974).

nium. Page 56 of the Report discusses S. 2744's requirements for the qualifications of Commission [12] members. Aside from not addressing the issue of reactor licensing, the proposed language in the Senate bill (S. 2744, § 201(b)(2)) was omitted from the final legislation. 42 U.S.C. § 5841.

NRDC next looks for support to § 307 of the Energy Reorganization Act, 42 U.S.C. § 5877. That section requires the Commission to submit an annual report to Congress. The report must include a description of the Commission's activities "insuring the safe, permanent disposal of high-level radioactive wastes through the licensing of nuclear activities and facilities." *Id.*, § 307(c)(5). Given §§ 104 & 202 of the Act, 42 U.S.C. §§ 5814, 5842, the "activities and facilities" referred to are reprocessing and waste solidification activities (including related interim storage facilities) [13] and ERDA's waste disposal facilities. The Commission's 1975 Annual Report confirms that interpretation. U.S. NUCLEAR REGULATORY COMMISSION, ANNUAL REPORT 1975, at 59-60 (1976). In describing the operating license review performed by the Commission, that Report mentions only the *on-site* waste handling system, and does not indicate that the operating license review addresses the away-from-reactor waste storage issue posed by NRDC. *Id.* at 18-19. Thus, Congress has been, and is, aware of the scope of the Commission's pre-issuance operating license review.

NRDC also seeks support from § 203(b)(2)(B) of the Energy Reorganization Act, 42 U.S.C. 5843(b)(2)(B). That section, which identifies certain responsibilities of the Di-

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[12] S. 2744 proposed that the independent regulatory agency be named the Nuclear Safety and Licensing Commission. *See* S. REP. No. 93-980, 93d Cong., 2d Sess. at 103 (1974). In conference, the Commission was renamed the Nuclear Regulatory Commission. H.R. REP. No. 93-1445, 93d Cong., 2d. Sess. 25 (1974) ("CONFERENCE REPORT").

[13] *See e.g.*, 10 C.F.R. Part 50, App. F (1977).

rector of Nuclear Reactor Regulation, does not assist NRDC's argument that pre-issuance safety findings must include an inquiry into the permanent off-site management of high-level radioactive waste. Section 203 is "concerned with [reactor] licensing and related regulatory activities within the boundaries of the nuclear reactor." CONFERENCE REPORT at 36. The Commission has defined the Director of Nuclear Reactor Regulation's responsibilities under § 203 (b)(2)(B) of the Energy Reorganization Act to include the "evalua[tion of] methods of transporting nuclear materials and radioactive wastes *on reactor sites.*" 42 Fed. Reg. 36,797, 36,801 (1977) (to be codified in 10 C.F.R. § 1.61) (emphasis supplied). Section 203 clearly does not authorize the Director of Nuclear Reactor Regulation to include in his pre-license safety findings an inquiry into DOE's storage of high-level wastes.

Finally, NRDC points to § 204, 42 U.S.C. § 5844. That section creates within the Commission an Office of Nuclear Material Safety and Safeguards ("NMSS"). The Director of NMSS is responsible for licensing and regulation of facilities and materials "associated with the processing, transport, and handling of nuclear materials", § 204(b)(1), 42 U.S.C. § 5844(b)(1), and thus, under the terms of the statute, has no licensing authority over nuclear reactors. *See also*, CONFERENCE REPORT at 36. The NMSS responsibility to develop "contingency plans for dealing with threats, thefts, and sabotage relating to . . . high-level radioactive wastes", § 204(b)(2)(B), 42 U.S.C. § 5844(b)(2)(B), simply is unrelated to reactor licensing decisions.

In short, NRDC has done nothing more than collect a patchwork quilt assortment of references in the Energy Reorganization Act and its legislative history in an attempt to bolster its argument that the Commission's pre-operating license issuance review must include an inquiry into the safety of the permanent management of these wastes. Upon analysis, none of those references supports NRDC's

argument. To the contrary, the total statutory scheme expressly contemplates the separation of the licensing of waste management facilities from the licensing of reactors.

B. In Enacting the Energy Reorganization Act, Congress Clearly Rejected Requests for a Moratorium on the Issuance of Reactor Operating Licenses.

In Senate hearings on S. 2744, Congress was told in December, 1973—in terms not unlike those now used by NRDC—how dangerous and how long-lived high-level waste is. Witnesses commented on what they perceived to be the lack of progress in waste management on the part of the AEC. Specifically, Congress was told "that present nuclear power plant construction plans, which imply accumulation of more radioactive wastes, should be halted until a proven method for safely storing radioactive wastes is available." *Hearings on S. 2744 Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations,* 93d Cong., 1st Sess. 213 (1973). *See also, id.* at 262.

In Congressional hearings on the same bill in February and March, 1974 (in conjunction with S. 2135),[14] nuclear wastes were specifically identified as a problem with respect to reactor licensing, and their long decay times were referred to as part of a "technology which involves a risk to the continued existence of life on earth." *Hearings on S. 2135 and S. 2744 Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations,* 93d Cong., 2d Sess. 212-13 (1974).

In the floor debate on the passage of H.R. 11510 (eventually enacted as the Energy Reorganization Act of 1974), it was conceded that a waste disposal facility had not yet

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[14] S. 2135, 93d Cong., 2d Sess. (1974) was designed, *inter alia,* to establish a Department of Energy and Natural Resources.

been constructed. Indeed, Representative Holtzman alleged that "we still do not have a real answer to the safe disposal of nuclear wastes." 119 CONG. REC. H11,732 (daily ed. Dec. 19, 1973). Included in the Senate floor debate on the passage of S. 2744 was a published article paraphrasing an argument for a moratorium on additional reactors because of the waste management problem. 120 CONG. REC. S15,037 (daily ed. Aug. 15, 1974).

Despite these requests for moratoria, the Energy Reorganization Act which finally emerged did not halt the licensing of nuclear reactors. As noted above, the Act charged ERDA with paramount high-level waste management responsibility and required the Commission only to license ERDA storage facilities. Further, in discussing § 202 of the Act, *supra*, the Senate and Conference Reports expressly recognized that the ERDA facilities which were to store this high-level waste were not yet in existence. S. REP. No. 93-980, 93d Cong., 2d Sess. 59-60 (1974); CONFERENCE REPORT at 34.

Congress's choice is evident. It was aware of the waste management issue now raised by NRDC. Its response was to allow the nation's nuclear program to continue while ERDA developed the necessary facilities for long-term waste management. This Court should not construe the Atomic Energy Act in a manner that would contradict Congress's decision.

C. In Enacting the Department of Energy Organization Act, Congress Expressly Recognized the Waste Management Problem, but Rejected the Solution Now Advocated by NRDC.

Section 301 of the Department of Energy Organization Act, 42 U.S.C.A. § 7151 (Supp. 3, Nov. 1977), transferred all of ERDA's functions to DOE. As noted above, ERDA's then existing responsibilities included high-level waste management. Section 203(a)(8) of the Act, 42 U.S.C.A.

§ 7133(a)(8), delineates these waste management responsibilities as follows:

> (A) the establishment of control over existing Government facilities for the treatment and storage of nuclear wastes . . .;
>
> (B) the establishment of control over all existing nuclear waste in the possession or control of the Government and all commercial nuclear waste presently stored on other than the site of a licensed nuclear power electric generating facility . . .;
>
> (C) the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes;
>
> . . . .
>
> (E) the establishment of programs for the treatment, management, storage, and disposal of nuclear wastes;
>
> . . . .

Moreover, the Commission's licensing responsibilities for waste storage facilities remain unchanged. *Id.*

Section 203(a)(8) had its genesis in hearings held before the Senate Committee on Governmental Affairs on April 8, 1977. The purpose of those hearings, as announced by the chairman, Senator Mathias, was to address "how the proposed reorganization will affect programs within the Federal Government dealing with nuclear waste management." *DOE Hearings* at 818. After reviewing the difficulties and lack of progress in waste management, Senator Mathias noted, "We need to know what this reorganization will do to remedy this situation. If it will not do enough, then we must look to more specific remedies—legislation specifically—to resolve the dilemma." *Id.* at 819.

During the course of those hearings, the Senate Committee was specifically told of the filing of NRDC's Petition for Rulemaking with the Commission (*DOE Hearings*

at 867) and that NRDC had asked the Commission to refrain from issuing additional operating licenses for nuclear power reactors until a "definitive finding of safety with respect to generation and disposal of radioactive waste can be and is made." *Id.* at 885. Similar contentions made by the State of Wisconsin were also brought to the Committee's attention. *Id.* at 884, 910. Dr. Clifford V. Smith, Jr., Director, Division of Fuel Cycle and Material Safety of the Nuclear Regulatory Commission, precisely framed NRDC's contention for the Committee:

> [W]e at NRC are continually perplexed or concerned, I should say, that we get on to the matter of finding a permanent solution to this [high-level waste management] problem. Because each time we license a reactor this question is posed.
>
> Senator Mathias. You are adding to the problem.
>
> Dr. Smith. We are adding to the problem that is contributing to the inventory.

Id. at 871.

Thus when presented with a vehicle—the proposed Department of Energy Organization legislation—with which to address the issue, Congress did not impose a moratorium or direct any halt in reactor licensing. Instead, Congress chose to accelerate and emphasize DOE's waste management responsibilities. 123 CONG. REC. S7929-30, S7948-49 (daily ed. May 18, 1977). As Senator Jackson explained, "Obviously, it [waste management] is a matter of critical importance in connection with the nuclear programs. We have an enormous amount of nuclear waste that must be more effectively managed. A solution is essential in connection with any *ongoing* nuclear power program." *Id.* at S7949 (emphasis added).

Despite the consistent regulatory approach mandated by Congress in enacting both the Energy Reorganization Act and Department of Energy Organization Act, NRDC persists in its argument that the Commission, as a prerequisite

to reactor operating license issuance, must make a definitive safety finding concerning the long-term storage of high-level radioactive waste. NRDC is literally asking this Court to direct the Commission to hold an inquiry to determine whether DOE will satisfactorily accomplish its waste management responsibilities. NRDC implies this is necessary because there is no guarantee that DOE will carry out its Congressionally-assigned mission. This unreasonable assumption flies in the face of the long-standing doctrine which presumes agency regularity, *see e.g., United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *TNT Tariff Agents, Inc.* v. *ICC*, 525 F.2d 1089, 1093 (2d Cir. 1975); *United States* v. *Sandbank*, 403 F.2d 38, 40 n.* (2d Cir. 1968), *cert. denied*, 394 U.S. 961 (1969), and should be rejected by this Court.

II.

NEPA CANNOT AND DOES NOT SUPPORT THE DEFINITIVE FINDING OF SAFETY DEMANDED BY NRDC.

A. NRDC and California Are Now Foreclosed from Raising This Argument.

Appearing for the first time in NRDC's Petition for Review is the argument that NEPA requires the Commission to make the "definitive" safety finding demanded by NRDC. Petition for Review at 2, 6, 7. NRDC's Brief (at 23-24, 39-43) echoes this argument. California likewise contends that NEPA at least supports the requirement for such findings. California Brief at 14-17. Significantly, neither NRDC nor California made this—or any similar argument—before the Commission, and the Commission's denial of NRDC's Petition for Rulemaking does not discuss what safety findings, if any, are required by the Commission pursuant to NEPA.

Simply put, the failure to present this legal theory to the Commission prevents its introduction for the first time here. *Unemployment Compensation Commission of Alaska*

v. *Aragon,* 329 U.S. 143, 155 (1946); *Cisternas-Estay* v. *Immigration and Naturalization Service,* 531 F.2d 155, 160 (3rd Cir.), *cert. denied,* 429 U.S. 853 (1976) (failure to raise issue of amendments to agency's regulations); *National Forest Preservation Group* v. *Butz,* 485 F.2d 408, 411 (9th Cir. 1973) (failure to raise Wilderness Act arguments before Forest Service).

Courts have, on occasion, recognized exceptions to the general principle that legal arguments must be presented in the first instance to the agency. *See, e.g., Hormel* v. *Helvering,* 312 U.S. 552, 557 (1941). NRDC has pointed to no special circumstances nor claimed any injustice that would justify relaxing the prohibition in this case and has made no attempt whatsoever to excuse its failure to present this argument previously to the Commission. Even though it is an *amicus,* California's position is no more supportable than NRDC's. Not only did California fail to raise this argument below, it abstained altogether from participation in proceedings before the Commission.

> [I]t is incumbent 'upon an interested person to act affirmatively to protect himself' in administrative proceedings. . . . As we have admonished, '[t]o permit such a person to stand aside and speculate on the outcome; if adversely affected come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation.'

Nader v. *NRC,* 513 F.2d 1045, 1054-55 (D.C. Cir. 1975). *See also, Gage* v. *AEC,* 479 F.2d 1214, 1218-19 (D.C. Cir. 1973).

It is no answer to suggest that the Commission considered the entire subject of pre-license findings and thus had an opportunity to consider what, if any, findings were mandated by NEPA. In *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386 (S.D.N.Y. 1966) (three-judge court), *vacated on other grounds,* 386 U.S. 776 (1967), Judge Friendly refused to consider the issue of pre-merger interim protection of the New Haven Railroad because of

plaintiffs' failure to raise that issue before the ICC in a comprehensive proceeding to approve the entire merger. 261 F. Supp. at 394. That same rationale should apply here.

The Commission's order below does not address the question of what, if any, safety findings are mandated by NEPA, because neither NRDC nor California sought a decision based on NEPA. Accordingly, NRDC and California should be foreclosed from pressing that argument in this forum.

B. NEPA Does Not Require the Safety Finding Requested by NRDC.

In the event the Court elects to consider on the merits NRDC's argument that NEPA requires definitive safety findings, Intervenors submit that the defects in the argument will become readily apparent. NRDC contends that since NEPA requires the NRC to consider the environmental effects of waste management prior to the issuance of a reactor operating license, then "[f]or the same reasons . . . the safety of future waste disposal must be determined as part of the 'definitive safety finding' required under the AEA and the *Power Reactor* case." NRDC Brief at 41; *see also, id.* at 23-24.

The first prong of this argument is based on *Vermont Yankee*. NRDC Brief at 23-24, 40-41. Briefs in that case have been submitted to the Supreme Court, and oral argument was heard on November 28, 1977. The *Vermont Yankee* decision held only that long-term waste management is an appropriate subject for Commission NEPA review prior to licensing a reactor for operation. The Court of Appeals specifically did not address whether, and therefore did not even suggest that, the Commission must, pursuant to its Atomic Energy Act responsibilities, make a definitive finding of safety on the subject.

The second half of NRDC's argument, which attempts to transform duties under NEPA into those required under

the Atomic Energy Act, has only symmetry to commend it. This argument totally confuses the purposes of each statute and should be rejected by this Court.

NEPA requires the Commission only to give *consideration* to environmental values when carrying out its licensing responsibilities. The words of the statute confirm this, 42 U.S.C. § 4332(2)(B), and NEPA has been so construed from the outset. *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109, *passim* (D.C. Cir. 1971). As the court observed in that case, "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations." 449 F.2d at 1112. NEPA's basic purpose has been similarly construed by the Supreme Court, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 409, 417 (1976), and this Circuit. *See County of Suffolk* v. *Secretary of Interior*, 562 F.2d 1368, 1375 (2d. Cir. 1977), noting that the purpose of NEPA is to " 'compel the decision-mak[er] to give serious weight to environmental factors in making discretionary choices.' "

NEPA does not dictate that the agency, after consideration of environmental factors, reach a pre-ordained result. As this Court earlier observed, NEPA "does not require that a particular decision be reached, but only that all factors be fully explored." *Scenic Hudson Preservation Conference* v. *FPC*, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *see also, Vermont Yankee, supra* at 654; *Chelsea Neighborhood Associations* v. *U.S. Postal Service*, 516 F.2d 378, 384 (2d Cir. 1975). NEPA recognizes that projects may go forward even in spite of "adverse environmental effects which cannot be avoided." 42 U.S.C. § 4332(2)(C)(ii).

In stark contrast to the duty of consideration of environmental factors under NEPA are the Commission's responsibilities imposed under the Atomic Energy Act. "As a

precondition to the grant of a license for operation of a nuclear facility, the Atomic Energy Act explicitly requires a Commission *finding* that the licensed facility will afford 'adequate protection to the health and safety of the public' ". *Nader* v. *NRC*, *supra* at 1052, *quoting* § 182a. of the Atomic Energy Act, 42 U.S.C. § 2232(a) (emphasis supplied). *See also*, *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 406-07 (1961); *North Anna Environmental Coalition* v. *NRC*, 533 F.2d 655, 659 (D.C. Cir. 1976). Unlike NEPA, which does not dictate a particular result, the Atomic Energy Act forbids authorization of an operating license should the Commission find that "issuance of a license . . . would be inimical to . . . the health and safety of the public." Atomic Energy Act, § 103d., 42 U.S.C. § 2133(d); *see also*, *North Anna Environmental Coalition*, *supra*. The statutory duty to make prescribed affirmative findings prior to the issuance of a license is radically different from the neutral duty imposed under NEPA simply to consider environmental factors.

In simultaneously construing NEPA and the Atomic Energy Act, courts have specifically recognized that the duties imposed by each statute are different. *Calvert Cliffs'*, *supra*, recognized the difference between the Commission's duty to make affirmative findings and its duty to give consideration to environmental factors. 449 F.2d at 1118. Further, *Union of Concerned Scientists* v. *AEC*, 499 F.2d 1069, 1078-79 (D.C. Cir. 1974) rejected an attempt to equate duties required under NEPA with those required under the Atomic Energy Act. The Supreme Court itself, in recognizing that NEPA was not intended to repeal existing statutes, has observed that NEPA " 'shall [not] in any way affect the specific statutory obligations of any Federal agency. . . .' " *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 694 (1973), *quoting* 42 U.S.C. § 4334.

NRDC attempts to garner additional support for its "equivalency" argument from *Citizens for Safe Power, Inc.* v. *NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975). NRDC Brief at 40. Although less than clear, that decision deals primarily with the procedure by which the Commission fulfills its Atomic Energy Act responsibilities. 524 F.2d at 1295 n.7, 1298. Rather than supporting NRDC's demand for specific safety findings, the opinion suggests that if an issue—specifically in that case the acceptability of certain unquantifiable residual risks that remain even if reactor operation complies with Commission regulations—is considered by the Commission during its NEPA cost-benefit balancing, then there is no need for the Commission to make a specific, detailed safety finding on that same issue. 524 F.2d 1297-1300. Given the Commission's full NEPA consideration of the environmental effects of waste management, see pp. 10-11 *supra*, *Citizens for Safe Power* suggests that no specific safety finding on this issue is necessary.

For its part, California urges that § 102 of NEPA, 42 U.S.C. § 4332, requires that the Atomic Energy Act be construed in accordance with NEPA's policies. California Brief at 16-17. That argument is wide of the mark. This litigation, unlike *Vermont Yankee*, does not present for review the propriety of Commission licensing actions with respect to NEPA. The Commission presently considers the environmental effects of off-site, long-term, high-level waste management in individual reactor licensing decisions. Pp. 10-11, *supra*. More importantly, NEPA cannot expand the scope of the Commission's *safety* findings required by the Atomic Energy Act. *Cf. Gage* v. *AEC*, *supra* at 1220 n. 19; *Kitchen* v. *FCC*, 464 F.2d 801 (D.C. Cir. 1972).

In support of this argument, California places substantial reliance (Brief at 16-17) on Judge Richey's suggestion in *Natural Resources Defense Council, Inc.* v. *SEC*, 389 F. Supp. 689, 695 (D.D.C. 1974) that NEPA may expand the SEC's responsibilities to require corporate disclosure

of certain environmental information under the securities laws. What California omits to point out, however, is that when the same issue, after remand, was again presented to the same court, the same judge flatly held that NEPA, including § 102, 42 U.S.C. § 4332, did *not* so expand the agency's responsibilities. *Natural Resources Defense Council, Inc.* v. *SEC*, 432 F. Supp. 1190, 1197-98 (D.D.C. 1977), *appeal docketed*, No. 77-1761 (D.C. Cir. Aug. 22, 1977).

Accordingly, if this Court permits NRDC and California to advance the NEPA argument, even though it was not made below, the argument should be rejected on the merits.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Review filed by NRDC.

Respectfully submitted,

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January 13, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents, POWER AUTHORITY OF THE STATE OF NEW YORK, ET AL., AMERICAN ELECTRIC POWER COMPANY, ET AL., BOSTON EDISON COMPANY, ET AL., PENNSYLVANIA POWER & LIGHT COMPANY, Intervenors.	)	No. 77-4157 On Petition for Review of Action of the United States Nuclear Regulatory Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 1978, I served two copies of the foregoing document entitled "Brief for Intervenors Power Authority of the State of New York, et al." and single copies of the foregoing documents entitled "Intervenors' Designation of Documents for Inclusion in Joint Appendix", and "Notice of Appearance" by deposit thereof in the United States mail, first class postage prepaid, addressed to the following persons:

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